The exhaustive, detailed and overlapping requirements placed on the RBOCs and the multiple review by federal and state agencies with differing expertise make it clear that Congress intended a vigorous and rigorous regulatory process before RBOCs were to be authorized to sell in-region long distance. DOJ points out that Congress contemplated delay in RBOC entry.

> Congress carefully structured the four, interrelated prerequisites for BOC entry to ensure both (1) that the BOCs would have appropriate incentives to cooperate with competitors who wished to enter local markets and (2) the BOC entry into interLATA markets would not be held hostage indefinitely to the business decisions of the BOCs' competitors. Thus, rather than allowing for immediate entry or entry at a date certain, Congress chose to accept some delay in achieving the benefits of BOC interLATA entry in order to achieve the more important opening of local markets to competition.[32]

In section 271 [c](1) Congress required that there be a facilities-based competitor actually competing in the service territory of the RBOC for residential and business customers using predominantly its own facilities. Only under limited circumstances did Congress anticipate allowing RBOCs to sell long distance in region without being subject to facilities-based competition (See Table 3, Column 1).

In section 271 [c](2) Congress provided a more detailed list of specific actions that the RBOC had to take to open its network (see Table 3, Column 2). These referred back to the conditions identified in sections 251 and 252 and expanded on them in considerable detail. These conditions have come to be known as the 14 point check list, since there are 14 items on the list.

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[32] DOJ, SBC, p. 7.

TABLE 3
SUBSTANTIVE CONDITIONS FOR APPROVING RBOC ENTRY INTO IN-REGION, INTERLATA LONG DISTANCE

SECTION 271 [c](1)	SECTION 271[c](2)	SECTION 272	SECTION 271[d](3)
PROVIDE ACCESS AND INTERCONNECTION TO FACILITIES-BASED COMPETITOR	PROVIDE 14 POINT CHECK LIST ITEMS	SATISFY 272 REQUIREMENT	IN THE PUBLIC INTEREST
TRACK A OR TRACK B	FULL IMPLEMENTATION OF NON-DISCRIMINATION RATES, TERMS, CONDITIONS AND PROTECTIONS		
TRACK A: IS PROVIDING ACCESS AND INTERCONNECTION TO NETWORK FACILITIES FOR THE NETWORK FACILITIES OF ONE OR MORE UNAFFILIATED COMPETING PROVIDERS OF TELEPHONE EXCHANGE SERVICE TO COMPETITION RESIDENTIAL AND BUSINESS SUBSCRIBERS. STANDARD	INTERCONNECTION IN ACCORDANCE WITH SECTIONS 251 [C] (2) AND 251 [D](1) 1) NON DISCRIM, IN ACCORDANCE SECTION 251 [C](3) AND 251 [D](1) 2) NON-DISCRIM. ACCESS TO POLES 3) LOCAL LOOP 4) LOCAL TRANSPORT 5) LOCAL LOOP 6) LOCAL SWITCH 7) NON-DISCRIM 11 & E911 DIRECTORY OPERATOR 8) WHITE PAGES 9) NON-DISCRIM. NUMBERING 10) NON-DISCRIM DATA BASES 11) INTERIM NUMBER PORTABILITY 12) NON-DISCRIM. LOCAL DIALING PARITY 13) RECIPROCAL COMPENSATION UNDER SECTION 252 [D](2) 14) RESALE UNDER SECTIONS 251[C](4) AND 252[D](2)	SEPARATE AFFILIATE STRUCTURAL AND TRANSACTIONAL REQUIREMENTS NON-DISCRIM. SAFEGUARDS BIENNIAL AUDIT FULFILLMENT OF REQUESTS PROHIBITION ON JOINT MARKETING	PUBLIC INTEREST, CONVENIENCE AND NECESSITY COMPETITIVE TEST DANGEROUS PROBABILITY TO SUBSTANTIALLY IMPEDE VIII[C] TEST ANY OTHER SUBSTANTIAL OTHER FACTORS QUALITY CONSUMER PROTECT RATE STRUCTURE
TRACK B: IF EVIDENCE NO SUCH PROVIDER HAS REQUESTED THE ACCESS & INTERCONNECTION IN TRACK A OR FAILED TO NEGOTIATE IN GOOD FAITH, UNDER SECTION 252 OR VIOLATED TERMS OF AN AGREEMENT UNDER SECTION 252 THEN: STATEMENT OF GENERALLY AVAILABLE TERMS APPROVED BY STATE COMMISSION			
CONTROVERSIES			
TRACK A REQUEST FORECLOSES TRACK B ANALYSIS PROVIDE ACCESS AND INTERCONNECTION APPROVED AGREEMENT PREDOMINANTLY FACITLIES-BASED BUSINESS AND RESIDENTIAL	FINAL RULES PERFORMANCE STDS FULLY LOADED FUNCTIONING MONITORING ENFORCEABLE	IMPLEMENTED MONITORED MEANINGFUL, NON-TRIVIAL, REAL, SUBSTANTIAL, IRREVERSIBLE COMPETITION	NATURE OF HEARING COMPETITION

Congress added requirements in section 272 for separation between the local and long distance arms of the RBOCs and regulation of affiliate transactions between local and long distance companies (see Table 3, Column 3). It also added safeguard to ensure that affiliates would not receive favorable treatment. These protections refer back to section 251 and expand and elaborate on them.

Finally, in section 271 [d] the Congress added a broad public interest finding to the decision making process (see Table 3, Column 4).

While some have complained about the heavily regulatory approach to review of requests for in-region sale of long distance,[33] even a quick review of the major areas in which Congress imposed conditions on RBOC entry into long distance suggests the careful scrutiny that Congress desired. The FCC argues that this structure was necessary to respond to an important public policy problem.

> Although Congress replaced the MFJ's structural approach, Congress nonetheless acknowledge the principles underlying that approach -- that BOC entry into long distance would be anti-competitive unless the BOC market power in the local market was first demonstrably eroded by eliminating barriers to local competition. This is clear from the structure of the statute which requires BOCs to prove that their markets are opened to competition before they are authorized to provide in-region long distance services. We acknowledge that requiring businesses to take steps to share their market is an unusual, arguably unprecedented act by Congress. But similarly, it is a rare step for Congress to overrule a consent decree, especially one that has forced major advances in technology, promoted competitive entry, and develop substantial capacity in the long distance market. Congress plainly intended this to be a serious step. In order to effectuate Congress' intent, we must make certain that the BOCs have taken real, significant and irreversible steps to open their market..
>
> The requirements of section 271 are neither punitive nor draconian. They reflect the historical development of the telecommunications industry and the economic

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[33] Gassman, Lawrence, "The Telecommunications Act of 1996," Regulation, 1996

> realities of fostering true local competition so that all telecommunications of markets can be opened to be effective, sustained competition. Complying with the competitive checklist, ensuring that entry is consistent with the public interest, and meeting the other requirements of section 271 are realistic, necessary goals.[34]

Seeking to reduce or eliminate scrutiny of their requests, the RBOCs have attempted to minimize the requirements in each of these areas.[35] As a result a series of debates has taken place about the meaning of each of the conditions, as described at the bottom of Table 3. In the discussion that follows, we highlight the issues that have been disputed and the position taken by third parties representing consumer interests in each of these areas.

The FCC, the DOJ and the third party intervenors have insisted that the clear and distinct steps in the process be maintained. Each of the four tests constitutes a separate standard that must be met. The FCC's decision in the Ameritech Michigan application demonstrates a hierarchy of decision making, starting with section 271 (c)(1)(A),[36] working its way through each of the 14 points,[37] then the affiliate safeguards and finally the public interest standard.[38] At each

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[34] FCC Michigan, paras 18...23.

[35] They have done so in both the premature applications by Ameritech and SBC, but also in propounding general theories to interpret the law, see PacTel, Section 271 Guidebook, July 1996; Bell South, Statutory Avenues for Bell Operating Company Entry to the Long Distance Market, January 14, 1997.

[36] FCC Michigan, para .105.

> Because we have concluded that Ameritech satisfies section 271 © (1) (A), we must next determine whether Ameritech has fully implemented the competitive checklist in subsection © (2) (B).

[37] FCC Michigan, paras. 105...106.

> We conclude that Ameritech has not yet demonstrated by a preponderance of the evidence that it has fully implemented the competitive checklist. In particular, we find that Ameritech has not met its burden of showing that it meets the competitive checklist with respect to (1) access to its operations support system; (2) interconnection; and (3) access to

stage the intent of Congress and judicial construction of the concepts used in the statute must be applied.

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it 911 and E911 service. We do not decide whether Ameritech has met its burden of demonstrating compliance with the remaining items on the competitive checklist...

Given our finding that Ameritech has not yet demonstrated that it has fully implemented the competitive checklist, we need not decide in this order whether Ameritech is providing each and every checklist item at rates and on terms and conditions that comply with the Act.

[38] FCC Michigan, para. 42.

Although we do not reach the question of whether the authorization requested by Ameritech is consistent with the public interest, convenience, and necessity, the Department of Justice's examination of the state of local competition in Michigan is the type of analysis that we will find useful in its evaluation of future applications.

IV. FACILITIES BASED COMPETITION

A. DETERMINING WHICH PATH TO USE TO EVALUATE A REQUEST FOR ENTRY

The first condition that Congress imposed -- called Track A -- is the "Presence of a Facilities-Based Competitor." The requirement is that the RBOC "is providing access and interconnection to its network" under a "binding agreement" that has been "approved" with an "unaffiliated" competitor or competitors who are providing service to "residential and business subscribers" either "exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier."

The Congress provided for exceptions from the facilities-based requirement -- called Track B. The RBOC was not to be denied entry into in-region long distance only because facilities-based competitors were not trying very hard. Therefore, Congress allowed that RBOCs could be allowed entry without the presences of a facilities-based carrier under certain specific circumstances:

1) "if, after 10 months after the date of enactment no such provider has requested access and interconnection," or

2) after a request was made, the requesting party "failed to negotiate in good faith" or

3) after an agreement was made the competing local service provider "violated the terms of an approved agreement, by failing to comply "within a reasonable period of time, with the implementation schedule contained in such agreement."

In any of these cases, the RBOC could state general terms and conditions of

interconnection and move on to the next tests for entry.

The RBOCs have argued that if they have a request for interconnection under Track A which has not been implemented in a substantial way, they should be allowed to automatically move on to Track B, ten months after the passage of the Act.

The Department of Justice rejects SBC's interpretation, finding that it makes no sense given the clear words and intent of Congress.

> Having received requests for access and interconnection by qualifying potential facilities-based competitors, SBC cannot proceed under Track B.[39]
>
> But, contrary to SBC's contention, a BOC is not entitled to proceed under Track B simply because firms requesting interconnection and access for the purpose of providing services that would satisfy the requirements of Track A are not already providing those services at the time of the request. Such an interpretation of Section 271 would radically alter Congress' scheme, expanding Track B far beyond its purpose and, for all intents and purposes, reading the carefully crafted requirements of Track A out of the statute. Similarly, as discussed below, a requesting potential facilities-based carrier need not even have fulfilled all of Track A's requirements at the time of the BOC's Section 271 application to foreclose the BOC from proceeding under Track B, as congress understood that some time would be necessary before an agreement would be fully implemented and a provider could become operational.
>
> If SBC's interpretation of Track B were correct, Track B would no longer be a limited exception applicable where a BOC would otherwise be foreclosed indefinitely from entry into in-region interLATA markets. Rather, Track B would become the standard path, allowing BOCs to seek authorization to provide in-regional interLATA services even if not Section 252 agreement to.[40]

The Oklahoma Attorney General took the same point of view,[41] as did a group of thirteen

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[39] DOJ, SCB, p.vi.

[40] DOJ, SBC, pp. 13-14.

[41] AG Oklahoma, pp. 2-3.

> There is no evidence, no OCC certification, of such a provider's failure to negotiation in good faith or to comply with any implementation schedules. SBC's illogical

Attorneys General.[42] In essence, these Attorneys General envision a decision tree under section 271 [c](1). In their opinion, once a request has been made, Track A takes hold and the conditions outlined in Track A must be met.

B. DEFINING FACILITIES-BASED COMPETITION UNDER 271

After this first crucial decision point is passed, we enter into a debate over how to know that the conditions under Track A have been met (see Table 4). The key issues in the debate are

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misinterpretation of the Act, however, focuses on the "no such provider" language in Track B alleging that if Brooks is on a Track A qualifying competing provider of facilities based local exchange services, then no such provider has requested interconnection and access.

Clearly, the "no such provider" language refers only to the Track A requirement that any competing provider of local exchange service must be unaffiliated with SBC. Reading that language as SBC argues would lead to absurd results. It would totally emasculate Track A's requirements by making Track B available immediately as of September 8, 1997. The only way Track A is applicable under SBC's erroneous interpretation would be if such a competing provider was operational before it even requested interconnection and access.

In seeking interLATA authority, a BOC can travel down either Track A exclusively or Track B exclusively. The road taken determines the proper vehicle in which to travel toward interLATA authority, interconnection agreement on Track A or a statement of generally available terms ("SGAT") on Track B. The vehicle used, in turn, determines the standard by which the BOC must meet the access and interconnection requirements of section 271.

The facts are that Track A has certain requirements that must be met and that SBC has failed to meet them all.

[42] "Reply Comments of the Attorneys General of Delaware, Florida, Iowa, Maryland, Massachusetts, Mississippi, Missouri, New York, North Dakota, Oklahoma, Utah, West Virginia and Wisconsin, In the Matter of Application of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region InterLATA Services in Oklahoma, Federal Communications Commission, CC Docket No. 97-121 (hereafter, Attorneys General), p. 7.

> But as a general matter, Track B will be unavailable as a means of BOC in-region interLATA entry in a State from the time requests for interconnection and access were made until the implementation schedules included in interconnection agreement have been breached.

TABLE 4
SECTION 271 [C] (1) COMPLIANCE EVALUATION

TRACK A CONDUCT

1) REQUEST

2) GOOD FAITH NEGOTIATION

3) ON-TIME IMPLEMENTATION

4) TRACK B AVAILABLE

TRACK A CONDITIONS

1) PROVIDING ACCESS

2) APPROVED AGREEMENT

3) PREDOMINANTLY OWN FACILITIES FOR BUSINESS

4) PREDOMINANTLY OWN FACILITIES FOR RESIDENTIAL

5) SERVICE TO BUSINESS

6) SERVICE TO RESIDENTIAL

TRACK B

1) GENERALLY OFFERS TO PROVIDE ACCESS AND INTERCONNECTION

1) SGAT APPROVED OR PERMITTED TO TAKE EFFECT

COMPETITION ANALYSIS

1) IRREVERSIBLE

as follows:

> The RBOC must actually be providing interconnection.
>
> The agreement or agreements must be approved under section 252, which means it must be a final agreement approved by a state commission.
>
> The competitor or competitors must be using predominantly their own facilities.
>
> The competitors must be providing service to both business and residential customers.

While these conditions may seem straightforward, in the world of telecommunications policy even the obvious becomes obtuse. In the arguments leading up to the first applications and in the first two applications every one of the conditions was violated. The RBOCs argued that they did not have to actually be providing interconnection. Rather, merely saying something is available (offering it) is the same as actually providing it. The agreement Ameritech used in its first application had not even been signed by the competitor, not to mention approved by the state commission.

The Department of Justice and the Oklahoma Attorney General have taken a dim view of this use of hypothetical checklist items.

> In evaluating an application in this regard, the Department seeks to determine whether the BOC's local markets have been irreversibly opened to competition. The Department believes that the most probative indicator of whether a local market is open to competition is the history of actual commercial entry.[43]
>
> And, as the Conference Report notes, the presence of an operational competitor actually using the checklist elements is important in assisting the state commission and the FCC in determining, for purposes or Section 271(d)(2)(B), that the BOC has fully implemented the checklist elements set out in Section 271[c](2).[44]

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[43] DOJ, SBC, pp. vi-vii.

[44] DOJ, SBC, p. 10.

In Oklahoma, the competitor was not using predominantly its own facilities, nor was it providing service to both classes of customers.[45]

These Attorneys General believe that the specific conditions under Track A must be evaluated in the context of providing actual competition and the DOJ clearly rejects the idea that providing service to one subscriber in each customer class meets Congressional intent. The Department of Justice is placing more and more emphasis on the existence of actual competition.[46] The Wisconsin Public Service Commission has reached a similar conclusion.

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[45] AG Oklahoma, p. 5.

> Brooks "does not -- has not at any time served residential customers over its own facilities in Oklahoma. " Brooks serves a grand total of four residential subscribers in the entire state of Oklahoma. The local exchange service it provides to these subscribers is strictly by "[r]eselling Southwestern Bell's dial tone local exchange service." Moreover, not only is this residential service being provided only on a test basis, but each of the four subscribers are employees of Brooks. Indeed, since Brooks is not marketing residential service in Oklahoma, Brooks is not even offering facilities based local exchange service to residential subscribers a this time.
>
> Even the local exchange service that Brooks provides to its business subscribers cannot be described as predominantly facilities based service when twelve of its twenty business customers in Oklahoma are served over tariff leased facilities owned by SBC or resold ISDN service.

[46] "Evaluation of the United States Department of Justice," In the Matter of Application by Ameritech Michigan to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Service in Michigan, CC Docket 97-1 (hereafter, DOJ, Michigan), p. 30.

> In applying this standard, the Department will consider whether all three entry paths contemplated by the 1996 Act -- facilities-based entry involving construction of new networks, use of the unbundled elements of the BOC's network, and resale of the BOC's services -- are fully and irreversibly open to competitive entry to serve both business and residential customers. To do so, the Department will look first to the extent of actual local competition as evidence that local markets are open and whether such entry is sufficiently broad-based to support a presumption of openness. If broad-based commercial entry involving all three entry paths has not occurred, the Department will examine competitive conditions more carefully, and consider whether significant barriers continue to impede the growth of competition, focusing particularly on the history of actual commercial entry. We will assess the import of such entry as a means of demonstrating whether the market is open and establishing relevant benchmarks, but not as a way of requiring any specific level of

> The best way to make this showing would be through proof that broad-based competitive entry into local exchange markets has been successful in the State. If broad-based entry into local exchange markets has not occurred in the State, that would not foreclose the possibility of approval of a section 271 application if the BOC can otherwise prove that there are no significant impediments to such entry.[47]

The FCC takes a similar view.

> The most probative evidence that all entry strategies are available would be that new entrants are actually offering competitive local telecommunications services to different classes of customers (residential and business) through a variety of arrangements (that is, through resale, unbundled elements, interconnection with the incumbent network, or some combination thereof), in different geographic regions (urban, suburban, and rural) in the relevant state, and at different scales of operation (small and large). We emphasize, however, that we do not construe the 1996 act to require that a BOCs lose a specific percentage of its market share, or that there be competitive entry in different regions, at different scales, or through different arrangements, before we would conclude that bop entry is consistent with the public interest...
>
> Evidence that the lack of broad-based competition is not the result of a BOC's failure to cooperate in opening local markets could include a showing by the BOC that it is ready, willing, and able to provide each type of interconnection arrangement on a commercial scale throughout the state if requested.[48]

While the FCC has taken a position similar to the other third party intervenors, its interpretation of specific aspects of what constitutes facilities based competition is more lax than many have argued for. The FCC has accepted separate agreements covering different elements of the 14 items, rather than requiring that all elements be covered in a single agreement.[49] It would accept separate providers serving different customer classes rather than requiring that one or more

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actual local competition.

47 "Finding of Fact, Conclusions of Law and Second Order," Matters Relating to Satisfaction of Conditions for Offering InterLATA Service (Wisconsin Bell, Inc. D/b/a/ Ameritech Wisconsin), Public Service Commission of Wisconsin (hereafter Wisconsin), p. 5.

48 FCC Michigan, paras...391, 392.

49 FCC Michigan, para 72.

provides serve all customer classes.[50] It would allow unbundled elements to meet the "owned facilities" requirement.[51] It provided no guidelines for the scale and geographic scope of competition.[52] It did, however, decisively reject a mere handful of customers as an adequate indicator of competition.[53]

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50 FCC Michigan, para. 82.

51 FCC Michigan, paras. 101.

52 FCC Michigan, para. 76, 78..

53 FCC Michigan, para. 78.

V. THE COMPETITIVE CHECK LIST

The 14 items on the competitive check list have been the ones subject to the greatest scrutiny because most of the items were identified in sections 251 and 252 of the 1996 Act. As a result, all telecommunications companies commenced working on these details. State proceedings have been initiated in just about every state. Unfortunately, there may be more uncertainty regarding these conditions than any other area of the law. Many states have not issued final rules and, where they have, they have been challenged in court.

The fundamental question is, what does full implementation on a non-discriminatory basis of the 14 point competitive checklist mean. The third party intervenors have taken a position that can be summarized as follows

> Full implementation means that final rules are in place implementing equal quality service at fully commercial scale, with mechanisms in place to detect discrimination and enforce penalties to correct abuses.[54]

The details that are being debated are remarkable. Table 5 summarizes the points being

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[54] The Department of Justice (DOJ, SBC, pp. 23-24) stated this position as follows:

> By the same token, an agreement that does not set forth complete rates and terms of a checklist item, but merely invites further negotiations at some later time, falls short of "providing" the item as required by Section 271, as does a mere "paper commitment" to provide a checklist item, i.e. one unaccompanied by a showing of the actual ability to provide items on demand... In sum, a BOC is "providing" a checklist item only if it has a concrete and specific legal obligation to provide it, is presently ready to furnish it, and makes it available as a practical, as well as formal matter.

The Oklahoma Attorney General (AG Oklahoma, p. 4) reached a similar conclusion.

> The requirement that SBC must be "providing" access and interconnection demonstrates Congress' intent that such unaffiliated competing provider must be operational. "Operational" means "able to function or be used."

TABLE 5
SECTION 271 [C](2)(B) COMPETITIVE CHECKLIST
COMPLIANCE EVALUATION FOR EACH OF THE 14 CONDITIONS

FINAL RATES, TERMS, AND CONDITIONS
- CONCRETE AND SPECIFIC LEGAL OBLIGATIONS
- STATE APPROVED AGREEMENTS
- COURT CASES
- INTERIM ORDERS
- USAGE RIGHTS

COST-BASED RATES
- TELRIC OR OTHER

ACCESS TO INFORMATION AND LEGACY SYSTEMS
- PRE-ORDER
- ORDER
- PROVISION
- REPAIR AND MAINTENANCE
- BILLING

PERFORMANCE STANDARDS
- AUTOMATED
- QUALITY/RELIABILITY
- EQUAL FOR ALL
- COLLOCATION
- EXCLUSIONS

FULLY LOADED FUNCTIONING
- SUFFICIENTLY AVAILABLE
  - DEPLOYED
  - ACCESS IN VOLUME
  - ASSISTANCE FOR USERS
    - SPECIFICATIONS
    - INFORMATION
    - BUSINESS RULES
- OPERATIONALLY READY
  - TESTS/PILOTS
  - INTERNAL
  - THIRD-PARTY
  - INTER-CARRIER
- AUTOMATED

OVERSIGHT
- MONITORING - DATA
- ENFORCEMENT

debated. RBOCs have gone to their state commissions and the FCC asking for entry on the basis of interim orders that they themselves are appealing in the courts. In most states, the basis for establishing the prices to be charged for interconnection, unbundeled elements and resold services have not been established firmly and are still subject to court challenge. There are also problems with usage rights for vital inputs to telecommunications services. Even when final rates terms and conditions are available, they have delivered very different levels of service to competitors. Performance standards have not been equalized for technical and locational reasons.

Faced with this uncertainty, competitors find it extremely difficult to make major commitments to invest in local competition. The Department of Justice has concluded that they need much more certainty than that.[55] The Department of Justice is particularly concerned about the ability of RBOCs to provide wholesale functionality -- fully loaded functioning. Competitors have found that interfaces are not in place and have not even been tested in some instances. They are not automated, so that customers seeking to change service providers are forced to experience

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[55] DOJ, SBC, pp. 61-62.

Even if the issue related to SBC's support processes were adequately addressed, there could still be other obstacles to competitive entry in Oklahoma, which competitors would have to confront if they are ever able to cross the initial thresholds. For example, SBC has failed to show that its rates for unbundled elements, as established in the AT&T arbitration and as used in its SGAT, are consistent with underlying costs. The Oklahoma Corporation Commission has never found SBC's SGAT rates for unbundled elements and interconnection, or its interim arbitrated rates from which they were derived, to be cost-based... The OCC's proceeding to examine SBC's costs and set final prices will not even commence until later this summer, and it is not clear when this proceeding will be completed. Since it is not yet known what the final Oklahoma prices will be or how they will be determined, the provision for a true-up is hardly sufficient assurance that competitors will in fact be charged cost-based prices now or later

serious delays.[56]

As with competitive standards, regulators at the state [57] and federal level have come to

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[56] DOJ, SBC, p. vii.

SBC has failed to: (1) provide adequate wholesale support processes, which enable a competitor to obtain and maintain required check list items such as resale services and access to unbundled elements; and (2) provide (a) physical collocation, and (b) adequate interim number portability.

Actual market entry with successful commercial usage of the BOC's wholesale systems may be sufficient to demonstrate that the inputs competitors need are commercially available. Such entry also permits the formulation of performance benchmarks what will enable regulators and competitors to detect and constrain potential BOC backsliding and competitive misconduct after long distance entry. As of yet, there is no sufficient history of such entry in Oklahoma and our inquiry suggests that several significant obstacles to such competitive entry remain in place.

DOJ, SBC, p. 27.

Finally, the Department will consider whether a BOC has made resale services and unbundled elements, as well as other checklist items, practicably available by providing them via wholesale support processes that (1) provide needed functionality; and (2) operate in a reliable, non-discriminatory manner that provides entrants a meaningful opportunity to compete.

[57] Wisconsin, p.17.

Accordingly, the Commission finds that to meet its stated "tested and operational" requirement, Ameritech must provide access to each of the following interfaces: pre-ordering, ordering, provisioning, repair and maintenance, and billing. That access must be non-discriminatory, meaning in substantially the same time and manner that an incumbent LEC provides OSS functions to itself. Access to the necessary design and operating specifications must be provided to enable CLECs to use the interfaces. The burden of proof is upon Ameritech to show that these requirements have been fulfilled. That burden of proof has not been met.

Attorneys General, pp. 8-9.

CLECs need smooth and effective communications with the BOCs' databases in order to enable effective local exchange competition. If a BOC's OSS do not function well or break down, this will impede the CLEC's ability to service its customers and the customer will blame the CLEC rather than the BOC...

A BOC's OSS capability should be required to pass at least to tests before they are deemed

focus on actual provision of service under conditions of competition. The FCC's order in the Ameritech Michigan petition sought to elaborate and give specificity to the concept of fully loaded functioning.[58] The principles it adopted were as follows.

> Elements must be available subject to concrete and specific legal obligations embodied in a state approved agreement that sets the price, terms and conditions of service.[59]
>
> Rates must be based on forward looking costs, and the FCC intends to use its TELRIC methodology to determine if they are anticompetitive.[60]
>
> Competitors must have access to all processes, including interface and legacy systems (systems embedded within the incumbent's operating structure that support its services) to accomplish all phases of a transaction - - pre-order, order, provisioning, repair and maintenance, billing.[61]
>
> In order to meet the requirements of the act, the elements have to be operationally

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to satisfy the competitive checklist. First, the BOC must demonstrate that the systems incorporate sufficient capacity to be able to handle the volumes of service reasonably anticipated when local competition has reached a mature state. Second, the BOC's OSS capabilities must be proven adequate in fact to handle the burdens place upon them as local competition firs takes root. Testing of the systems by the BOC is not enough to provide reasonable assurance that they will function as planned with the system of CLECs. It will require some experience with the systems on a day-to-day basis under conditions of local competition in order to asses their adequacy on this measure.

Finally, some record of experience under conditions of local competition is necessary to reveal whether a BOC will engage in unfair nor discriminatory practices to inhibit entry into local exchange service markets. As a provider of essential bottleneck facilities, BOCs retain considerable market power in local exchange markets. The importance of OSS is just one example of BOCs' competitive significance in these markets. BOC promises of compliance with statutory prohibitions against unfair and discriminatory practices must be confirmed n the course of confronting real and effective competition in the marketplace.

58 FCC Michigan, summary at para. 22.

59 FCC Michigan, para. 110.

60 FCC Michigan, paras 280-288.

61 FCC Michigan, para. 135.

> ready and sufficiently available to meet the likely demand in volume and in a manner that does not discriminate against or place competitors at a disadvantage.[62]
>
> The ongoing performance of the BOC in supplying the elements should be subject to monitoring and enforcement to ensure the availability of elements at all phases of the interaction with competitors.[63]

The performance review of the BOCs became a central issue in the Ameritech proceeding. Once companies begin to compete, their success will be largely determined by their ability to deliver service. Since they are significantly dependent on the BOCs to initiate and maintain service, their fate can be determined difference in service quality. The Department of Justice and the Michigan Commission outlined a series of points which the FCC adopted in general. The performance measures are identified in Table 6.

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62 FCC Michigan, para. 136.

63 FCC Michigan, para. 140 with data requirements described in paras. 164, 205, 206 and 212.

TABLE 6

PERFORMANCE STANDARDS FOR CHECKLIST ITEMS

INSTALLATION IN INTERVALS FOR
- RESALE
- LOOPS

PERFORMANCE ASSESSMENT
- INTERFACE AND INTERNAL 0 S. S.
- UNBUNDLED NETWORK ELEMENTS
- PROVISION
- NUMBER PORTABILITY

PERFORMANCE ASSESSMENT INCLUDING COMPARISONS WITH AMERITECH RETAIL OPERATIONS
- SERVICE ORDER ACCURACY
- HELD ORDERS
- BILL QUALITY
- REPEAT TROUBLE REPORTS
- DIRECTORY ASSISTANCE
- WHITE PAGES
- OPERATOR SERVICES
- 911

REMEDIES OR PENALTIES FOR NONCOMPLIANCE

VI. AFFILIATE SAFEGUARDS

The affiliate safeguards contained in the 1996 Act are extremely detailed in their prescriptions. Beyond the traditional structural separations and requirements for arms length transactions (section 272 (b), the 1996 Act states a series of specific requirements covering goods, services, facilities, information, and standards (section 272 9c). It goes on to stipulate non-discrimination in the time period of services, the terms, conditions, and charges for service, as well as cost allocation requirements (section 272 (e)). Table 7 presents the conditions laid down in the Act.

One would imagine that with such clear language separate subsidiaries would be in place before an application is made for entry into in-region long distance. That has not been the case. To begin with, separate subsidiaries have not been set up, nor have the terms and conditions to govern the relationship between subsidiary and parent been established.

Even where separate subsidiaries have been set up, questions have been raised about the ability of regulators to monitor and prevent discrimination and cross subsidization. Since transactions are likely to be frequent, monitoring and enforcing non-discrimination will be an ongoing and considerable task.

TABLE 7
AFFILIATE SAFEGUARDS COMPLIANCE EVALUATION SECTION 272

A. REQUIRED SAFEGUARDS

272(b) STRUCTURAL SEPARATION
1) INDEPENDENT COMPANY
2) ACCOUNTS
3) OFFICERS, ETC.
4) NON-RECOURSE IN FINANCE
5) ARMS LENGTH TRANSACTIONS PUBLICLY AVAILABLE

272© NON-DISCRIMINATION
1) PROCUREMENT OR PROVISION OF GOODS, SERVICES, FACILITIES, AND INFORMATION
2) ACCOUNTING PRINCIPLES

272(e) FULFILLMENT OF REQUESTS
1) TIME TO PROVIDE
2) TERMS AND CONDITIONS CHARGES
3) COST ALLOCATION
4) COMPARABLE RATES TERMS AND CONDITIONS

272(g) PROHIBITION ON JOINT MARKETING

B. ADOPTION OF SAFEGUARDS

IMPLEMENTED
MONITORED
COMPLAINTS

C. EVIDENCE
PAST BEHAVIOR
BUSINESS PLANS
AFFILIATE ENTRY STRATEGIES
ORGANIZATIONAL CHARTS
AGREEMENTS
SCRIPTS

> **Important safeguards are not yet in place and would be rendered meaningless by Ameritech Michigan's entry into long distance at this time. The necessary resources for enforcement are not in place.** Various structural and non-structural safeguards contained in the federal act, including critical protections related to separate affiliates and cross-subsidization, have not yet been put in place; various rules necessary for the Michigan Public Service Commission to ensure enforcement are either not yet in place or have been challenged by Ameritech Michigan and await appellate determination. Currently the MPSC and the Commission do not collect the meaningful data necessary to protect ratepayers against cross-subsidization and do not make meaningful data publicly available for review. Such authority and regulatory resources must be in place if effective competition is to emerge.[64]

One example the MCF cites is the abuse of customer information to frustrate competition.

> It is also disturbing to learn, for example, that Ameritech Michigan customers who contact the company to obtain information necessary for switching to Brooks Fiber, often find themselves immediately engulfed by the sales fleet at Ameritech, anxious to keep them on board even if that means making unfair and unfounded disparaging comments about the competitor. Apparently Ameritech is boldly and routinely taking inquiries from its customers, questions posed in anticipation of switching carriers, and then immediately sharing that information with the sales team of the unregulated operation.[65]

A similar complaint was lodged against Bell South in Georgia when it first entered the information services industry.[66]

The Michigan Consumer Federation stresses a number of specific steps that should be taken prior to authorization of RBOC entry. These include the adoption of cost allocation rules between local and long distance, structures to protect telephone ratepayers from the risk of

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[64] MCF, pp. 4-5.

[65] MCF, p. 34.

[66] "Order of the Commission Regarding its Investigation into Southern Bell Telephone and Telegraph Company's Trial Provision of MemoryCall Service," Georgia Public Service Commission, Docket No. 4000-U. The opinion notes similar problems in Florida.

competitive ventures, provision of resources to monitor abuses and resolution of outstanding complaints about cross-subsidization. In particular, MCF stresses the transactional abuses that can, and have arisen.

The Department of Justice has suggested at least one set of inquiries to demonstrate the separate subsidiary requirement. It suggests business plans and agreements should be reviewed.

> The BOCs must provide in-region interLATA services in accordance with the separate affiliate requirements of s272. In order to evaluate compliance with this requirement, it will be useful to review business plans, organizational documents, agreements, or other evidence that shows that the BOCs will provide any authorized in-region interLATA services through one or more affiliates that are separate from any operative company entity that is subject to the requirements of Section 251[c] for as long as such affiliates are required, and that such affiliates will meet all of the structural and transactional requirements of Section 272 (b).[67]

The Department of Justice has identified one important structural area of concentration -- facilities used to provide interLATA long distance.

> It is also important to consider the means by which the BOC plans to provide interexchange services during the period for which the separate subsidiary requirements of Section 272 are in effect, including agreements to resell services of interexchange carriers, plans to provide interLATA services over existing BOC facilities, or plans to construct new facilities.[68]

The failure of the RBOCs to put structural safeguards in place and the difficulty of implementing non-structural safeguards has led for the call to require implementation before requests for entry are made. Mechanisms for monitoring the implementation of the safeguards and resolution of outstanding complaints are also considered crucial if they are to accomplish their goal.

We view this requirement to be of crucial importance, because structural and

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[67] DOJ, 271 Information, p. 8.

[68] DOJ, 271 Information, p. 9.

non-discrimination safeguards of section 272 seek to ensure that competitors of the BOCs will have non-discriminatory access to essential inputs on terms that do not favor the BOC's affiliates. These safeguards further discourage, and facilitate detection of, improper cost allocation and crosssubsidization between the BOC and its section 272 of affiliate. The safeguards, therefore, are designed to promote competition in all telecommunications markets, thereby fulfilling Congress is fundamental objective in the 1996 Act...

Section 271 (d) (3) (B) requires the commission to make a finding that the BOC applicant will comply with section 272, in essence of predictive judgment regarding the future behavior of the BOC. In making this determination we will look to past and present behavior of the BOC applicant as the best indicator of whether it will carry out the requested authorization in compliance with the requirements of section 272. Moreover, section 271 gives the commission the specific authority to enforce the requirements of section 272 after in-region interLATA authorization is granted.

For the reasons set forth below, we conclude that based on its current in past behavior, Ameritech has failed to demonstrate that it will carry out the requested authorization in accordance with the requirements of section 272.[69]

Ameritech undertook a series rather blatant steps to try to skirt the requirements of section 272.

In order to avoid the requirement for separate boards of director, Ameritech had no boards. Essentially, its local and long distance operations were presented as rudder less,captainless ships. The FCC rejected this ruse, arguing that companies must be considered to have direction and finding that under state law the stockholders must be construed as the Board of Directors for each of the companies.[70] Consequently, the companies have the same Board of Directors.

In order to avoid public disclosure as required by the act Ameritech transferred assets on

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[69] FCC Michigan, paras. 346...347...348.

[70] FCC Michigan, para. 349.